

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY OF MUSOMA**

AT MUSOMA

MISCL APPLICATION NO. 27 OF 2020

(Arising from Civil Case No. 7 of 2019 at the High Court of Tanzania at Musoma)

ELIAS MWITA SOMO AND 9 OTHERS APPLICANTS

VERSUS

BUNDA DISTRICT COUNCIL AND 4 OTHERS RESPONDENTS

RULING

Date of Last Order: 6th July, 2020

Date of Ruling: 10th July, 2020

KISANYA, J.:

This application has been made under Order XXXVII, Rule (1) (a) (b) of the Civil Procedure Code, Cap 33, R.E, 2002 (the CPC). The Applicants are, Elias Mwita Samo, Francis Nyerere Said, Musa Emmanuel (Administrator of the Estate of the Late of Paulina Stephano), Michael Thomas Kweka, John Mwita Chacha, Mgeri Matutu, Julius Odera, Msafiri Magirari Majige, Phares Megera and Musa Budeba Nzugira. They seek for an order of temporary injunction restraining the respondents, Bunda Town Council, Tanzania Roads Agency, Attorney General, Minister for Land and Human Settlement and Commissioner for Land from demolishing and evicting the applicants from the land in dispute pending final and conclusive determination of Civil Case No. 7 of 2019 which is pending before this Court.

The genesis of the application is the 2nd respondent's notice dated 26th April, 2019 informing the applicants on her intention to demolish houses built on the plots allocated to them by the 1st respondent. Following the said notice, the applicants

instituted Civil Case No. 7 of 2019. It was deposed that while the main case is pending, the 2nd respondent has started cutting trees, ready for commencement of demolition of the residential house in the disputed land and hence, the present application.

It is noteworthy that, the affidavit in support of the application was not challenged as the respondents' affidavit was expunged for being filed out of time fixed by this Court.

When this matter came up for hearing, the applicants were represented by Mr. Mligo, learned advocate while the respondents enjoyed the services of Ms. Subira Mwandambo, learned State Attorney. Since the respondents' affidavit was expunged, Ms. Mwandambo was directed to address the Court on legal issues only.

In his submission in chief, Mr. Mligo requested the Court to adopt his affidavit in support of the application as part of his submission. He argued that, demolition of the buildings on the disputed land while the matter is pending in Court will cause irreparable loss to the applicants. The learned counsel submitted that, the conditions for granting temporary injunction which were restated by this Court (Hon. De-Mello, J) in **SG3 Iwawa's Company Ltd vs Access Bank Tanzania Ltd**, Misl. Application No. 307 of 2019, HCT at Dar es Salaam (unreported) had been met. He therefore urged the Court to grant the injunction order pending determination of the main case.

In response, Ms. Mwandambo argued that, pursuant to O. XXXVII, r. 1(b) of the CPC, an injunction cannot be issued against the Government. She was of the firm view that, the Court may issue a declaratory order. The learned State Attorney submitted that, the conditions for granting temporary injunction which were underscored in **Atilio vs Mbowe** (1968) HCD No. 84 were not met by the applicants.

Ms. Mwandembo contended that, there was no evidence to prove that the 2nd respondent had started to clear the disputed land. She went on to argue that, the applicants had already quantified their respective houses for purposes of compensation and that, granting injunction will cause an irreparable loss to the Government and affect the public at large who depend on the road to be constructed. Ms. Mwandambo argued further that, the applicants had not disclosed the description of their houses or plots for the Court to grant an injunction on a specific area.

Mr. Mligo rejoined by submitting that, issuance of injunction against the Government depends on the circumstances of each case. He argued further that, the affidavit in support of the application is an evidence to prove that the 2nd respondent is in the process of demolishing the structures on the disputed land. The learned advocate contended that, the fact that the applicant will be compensated is an issue of fact and that, the description of the properties had been stated in the affidavit in support of the application and the main case.

It is deduced from the submissions by both parties that, an order for injunction can be granted upon meeting the conditions set out in **SG3 Iwawa** (*supra*) and **Atilio** (*supra*). Both cases are to the effect that, the applicant must prove existence of the following conditions for the Court to grant the application for temporary injunction:

- a) There must be a serious question to be tried on the alleged facts and a probability that the plaintiff will be entitled to the relief prayed,
- b) That, the court's interference is necessary to protect the plaintiff from the kind of injury which may be irreparable before his legal right is established and,

- c) That, on the balance there will be greater hardship and mischief suffered by the plaintiff from withholding of the injunction than will be suffered by the defendant from the granting of it.

It is settled law that, all three conditions must be met. Meeting one or two of the three conditions will not be sufficient for the Court to grant an injunction. The issue then is whether the application at hand has met the said conditions.

On the first condition, the applicants contend that, the 2nd respondent has started cutting trees, ready for commencement of demolition of the residential houses of the applicant. This is a question of fact. The applicant has not stated as to when the 2nd respondent started to cut down the trees. Further the plots which the respondent have started to cut the trees were not specified. Therefore, the first ground was not proved accordingly.

Even if it is considered that, the 2nd respondent has started to cut down the trees as the first step of demolishing the residential houses on the disputed land, the next issue for consideration is whether the applicants will suffer irreparable loss before the main case is determined. It is trite law that, injunction can only be granted upon proving that, the applicant will suffer irreparable loss which cannot be compensated by award of general damages. Paragraph 7 of the affidavit in support of the application reads:

“That, the demolishing the houses in the land in dispute while the matter or dispute is not determined shall cause irreparable loss to the applicant.”

In the light of the above, it is clear that the particulars of loss to be suffered by the applicants was not specified. The same was not stated at all in the submissions by the counsel for the applicants. Further, it was not proved whether the said loss cannot be compensation by award of damage. I have gone through the plaint of the main case and noted that, the applicants have requested for compensation of Tshs


1, 100,000, 900 being the value of the houses on the disputed land. Each applicant has pleaded the compensation which he/she is entitled to. Therefore, I am in agreement with Ms. Mwandambo that, the loss is not irreparable because the plaintiff may be compensated as pleaded in the plaint. For that reasons, I find that the second condition has not been met by the applicants.

The last condition is on consideration of the balance of convenience. It is settled law that, in determining this issue, the Court has to consider whether it is the Applicant or the Respondent who stands to suffer more in the event the injunction order is granted. The applicants did not depose that fact in their affidavit. Also, apart from stating that principle, the learned advocate for the applicants did substantiate how the applicants will suffer more than the respondents if the order is not granted. On the other hand, Ms. Mwandembo invited the Court to hold that the Respondents (Government) and the public at large will be affected by the injunction order. According to the notice appended to the applicants' affidavit, it appears that, the 2nd respondent wanted to demolish the houses alleged to have been constructed on the road reserve. Roads are used by the public and not the respondent only. Therefore, it is my considered opinion that granting temporary injunction might affect the Government and the public at large.

In the event, I find no merit in the application as the prerequisite for granting temporary injunction have not been met. The application is accordingly dismissed. Costs to be determined in the main case.

Dated at MUSOMA this 10th day of July, 2020.




E. S. Kisanya
JUDGE
10/07/2020